Supreme Court, U.S.
FILED
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No. 92-244

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

Peter R. Piekarski,

Petitioner,

vs.

Home Owners Savings Bank, F.S.B.,
and M. Gene Donley,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT M. GENE DONLEY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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150 South Fifth Street
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(612) 335-1500
Counsel for Respondent M. Gene Donley

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RESPONDENT M. GENE DONLEY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. OPINIONS BELOW

The opinions below are adequately set forth in the Petition for Writ of Certiorari ("Petition") and are appended to the Petitioner's Appendix.

II. JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

III. QUESTIONS PRESENTED

1. May a litigant raise in his Petition for a Writ of Certiorari an issue that was never appealed below and not considered by the Eighth Circuit Court of Appeals?

2. If the answer to Question 1 is in the affirmative, does the removal of this case present grounds for granting certiorari under Rule 10.1(a) of the Rules of the Supreme Court of the United States?

3. Should this Court grant review to reconsider its decision in William Louis Smith v. Wayne S. Barry, ___ U.S. ___, 112 S.Ct. 678, 116 L.Ed. 2d 678 (1992), in which the Court resolved a conflict in the circuits and held that a "collateral document" filed within the time for appeal can serve as a "functional equivalent" of a notice of appeal satisfying Federal Rule of Civil Procedure 3(c)?

The Office of the United States Solicitor General is preparing the Brief in Opposition to Writ of Certiorari on behalf of the Resolution Trust Corporation, receiver for Respondent Home Owners Savings Bank, F.S.B., on the first two issues set forth above. In this Brief in Opposition, Respondent M. Gene Donley will address the third issue set forth above and adopts the position taken by the Solicitor General as to the remaining issues.

IV. STATUTES INVOLVED

The statute involved in this matter is 12 U.S.C. § 1441a(l), prior to its amendment in 1992.

V. STATEMENT OF THE CASE

The trial court entered final judgment in this matter on March 19, 1991, awarding damages to Petitioner against Respondents M. Gene Donley ("Donley") and Home Owners Savings Bank, F.S.B. ("Home Owners") based upon four causes of action arising from Petitioner's January 1988 termination from his position of Vice President in Charge of Mortgage Lending at Home Owners-Fergus Falls. Two other defendants, Home Owners Federal Savings and Loan Association ("Home Owners-Boston") and Knutson Mortgage Corporation ("Knutson") were dismissed from the action prior to entry of final judgment.

On April 5, 1991, Respondents Donley and Home Owners filed a timely Notice of Appeal from this final judgment. The caption in the Notice of Appeal indicated M. Gene Donley, et al., as Appellants, and the text indicated that Appellants (in the plural) were appealing the trial court's judgment to the Eighth Circuit Court of Appeals. The Notice of Appeal was served and filed with an attachment, a document entitled "Appellants' Information Form A," which expressly listed both Donley and Home Owners as Appellants. Respondents Donley and Home Owners thereafter also filed an amended Notice of Appeal on May 2, 1991, based upon the provision of Rule 4(a)(1) which allows any party 60 days after the entry of judgment to file a Notice of Appeal where an agency of the United States is a party.

VI. ARGUMENT

A. The Exercise of Appellate Jurisdiction Over Defendant Donley does not Conflict with any Established Precedent

The Petitioner's challenge to the exercise of appellate jurisdiction over Donley is expressly contrary to this Court's recent decision in William Louis Smith v. Wayne S. Barry, ___ U.S. ___, 112 S.Ct. 678, 116 L.Ed.2d 678 (1992). In Barry this Court held that a document which is provided to the court and served on opposing counsel within the time period for review can serve as the "functional equivalent" of a notice of appeal and satisfy the specificity of the requirement of Rule 3(c) when the actual notice of appeal is defective under this Rule. Despite the fact that the Barry decision was presented to the panel of the Eighth Circuit considering this case after this issue had been argued, Respondent's Appendix at A1-A2, and was also circulated to the Petitioner's attorney, id., he fails to mention it at any time in his Petition. Petitioner either intentionally omits reference to this controlling authority or overlooks its direct application in arguing that there is somehow an unresolved dispute between the circuits regarding whether a document filed before the time limit for an appeal can constitute a "functional equivalent" of a notice of appeal and satisfy the specificity requirement of Federal Rule 3(c). In any event, that issue has already been resolved by this Court contrary to Petitioner's position.

B. The Original Notice of Appeal Satisfies the Specificity Requirement of Appellate Rule 3(c)

Even under established precedent before Barry, the original Notice of Appeal filed by Respondents satisfied the specificity requirement of Appellate Rule 3(c), and this Court should deny the Petition on this ground as well.

The original Notice of Appeal and the attached Appellant's Information Form A provide unambiguous notice that both Donley and Home Owners were appealing the final judgment in this matter. The requirements of Appellate Rule 3(c) were therefore fully satisfied by that Notice. Rule 3(c) in pertinent part provides:

> The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. . . . An appeal shall not be dismissed for informality of form or title of the notice of appeal.

Fed. R. App. Pro. 3(c) (emphasis added). The purpose of the specificity requirement in this rule "is to provide notice to both the opposition and the court of the identity of the appellant or appellants. . . [and] the specificity requirement of Rule 3(c) is met only by some designation that gives fair notice of the specific individuals or entity seeking appeal." Torres v. Oakland Scavenger Co., 487 U.S. 312, 318 (1988).

In discussing what constitutes fair notice the Court in Torres said that, "if a litigant files papers in a fashion that is technically at variance with the letter of the procedural rule a court may nevertheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires." 487 U.S. at 316-17. This standard is clearly met in this matter, both on the face of the original Notice of Appeal and when also considering Appellant's Information Form A which was attached to the Notice of Appeal and served upon the plaintiff in the time period permitted for appeal.

The original Notice of Appeal specified "Home Owners Savings Bank, F.S.B., et al.," as defendants in the caption, but in the text read "defendants [in the plural] hereby appeal . . . from the final judgment entered in this action on the 19th day of March, 1991." Attached to the original notice was Appellant's Information Form A, which clearly identified both Donley and Home Owners as appellants. Appellant's Information Form A was served upon appellee on April 5, 1991, well within the minimal appeal time mandated by Appellate Rule 4(a)(1). Respondent's Appendix at A3-A4, A6, Schaefer Affidavit, ¶ 2, Exhibit A.

By claiming that the original notice and information form do not overcome the "jurisdictional hurdle" of Appellate Rule 3(c), Petitioner misreads both the authority interpreting this rule and its underlying purpose. The leading case in this area before Barry, Torres, supra, applied Rule 3(c) to dismiss an appeal by a party referred to in the caption of the Notice of Appeal as "et al." under far different circumstances than are present here. Torres, the unsuccessful appellant, was an intervenor in that case

and was not named in the Complaint, unlike Respondent Donley in this matter, who has been a named defendant throughout this lawsuit.

Furthermore, the documents filed in this matter are plainly distinguishable from those at issue in Torres and its progeny and this distinction requires a different result. The original Notice of Appeal on its face affords no plausible interpretation except that Donley and Home Owners-Fergus Falls are appellants. These were the only two defendants who were not dismissed by the district court's March 19, 1991 final judgment, and therefore the only plausible interpretation of the Notice of Appeal is that Respondents Donley and Home Owners were appealing the judgment identified therein. The use of "et al" in the caption and the plural "defendants" in the text of the notice could only have referred to both defendants. See Griffith v. Johnson, 899 F.2d 1427, 1429-30 (5th Cir. 1990) ("et al" satisfies the specificity requirement of Rule 3(c) when there can only be one other appellant).

If the Notice of Appeal left any ambiguity as to the identity of the appellants, this ambiguity was eliminated by Appellant's Information Form A attached thereto, which expressly identified both Donley and Home Owners as appellants. When a document satisfies the specificity requirement of Rule 3(c) and is filed within the time period for appeal, it must be treated as the functional equivalent of the Notice of Appeal and cure any defects therein. Barry, supra; Good Samaritan Hospital v. Sullivan, 952 F.2d 1017 (8th Cir. 1991); Griffith, supra; see also Brotherhood of Railroad Carpenters v. Atchison, Topeka and Santa Fe Railroad Co., 894 F.2d 1463, 1465 (5th Cir. 1990) (ambiguity arising from "et al" designation in Notice of

Appeal cured when remaining five appellants were all listed in a memorandum in support of motion for injunction pending appeal filed and served within the time period permitted for appeal); Dura Systems, Inc. v. Rothberg Investments, Ltd., 886 F.2d 551, 554-55 (3d Cir. 1989) cert. den. 110 S.Ct. 884 (1990) (Consent Order filed within time for appeal which secured the judgment in name of parties not enumerated in Notice of Appeal serves as "functional equivalent" of notice of appeal for these parties); cf. United States v. Schneider, 926 F.2d 777, 778-79 (8th Cir. 1991) (documents specifying previously unnamed appellants do not cure "et al" defect in Notice of Appeal because these documents were filed after the time permitted to appeal). Furthermore Donley, like the appellants permitted to proceed in Dura Systems, filed an appeal bond in this matter in accordance with the district court's order within the 30 day time limits of Appellate Rule 4(a)(1). Respondent's Appendix at A5, A10-A16, Schaefer Affidavit, ¶ 7, Exhibit E.

Under the circumstances of this case, where there were only two possible appellants, where the Notice of Appeal not only contained the "et al" designation but was also cast in the plural, and where the information form filed with the Notice of Appeal within thirty days from the entry of judgment expressly identified both appellants by name, the original Notice of Appeal met the specificity requirement of Appellate Rule 3(c).

C. The Amended Notice of Appeal was Timely Filed Pursuant to Rule 4(a)(1)

Even if the original Notice of Appeal did not satisfy the specificity requirement of Appellate Rule 3(c), there still is no basis for review as Respondents

cured any possible defect with the original Notice of Appeal by filing the timely Amended Notice of Appeal on May 2, 1991.

Appellate Rule 4(a)(1) states that "if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after [the date of the entry of judgment or order appealed from]" (emphasis added). The Resolution Trust Corporation ("RTC") has been extensively involved in this case as a defendant since it removed this matter to federal district court on May 17, 1990. The RTC is an agency of the United States government[1] and is a party to this case by virtue of its status as receiver over Home Owners-Boston, its ownership of Home Owners-Fergus Falls, and its removal of this action to federal court. See 12 U.S.C. § 1441a(b)(4) and 12 U.S.C. § 1821d(2)(A)(i) (providing that RTC, upon appointment as conservator "by operation of law succeed[ed] to . . . all rights, titles, powers and privileges of [Home Owners-Boston]"); see also NSPA Services Corp. v. Independent American Savings Association, 868 F.2d 1415 (5th Cir. 1989) (FSLIC as receiver over defendant is a party as a matter of law); Farina v. Mission Investment Trust, 615 F.2d 1068, 1074-1075, n.19 (5th Cir. 1984) (FDIC becomes a party to lawsuit when filing notice of removal). The RTC's continued involvement in this lawsuit is conclusively established by the district court's decision not to require defendant Home Owners to post a supersedeas bond in

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[1]Financial Institution Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), § 501(b)(1)(B), codified at 12 U.S.C. § 1441a(b)(1)(B).

connection with this appeal based upon the RTC's status under FIRREA. See Judge Devitt's April 25, 1991 Order.

The Eighth Circuit Court of Appeals' decision in Rochester Methodist Hospital v. Travelers Ins. Co., 728 F.2d 1006 (8th Cir. 1984) establishes that RTC's involvement in this lawsuit triggers the application of the 60-day period in Rule 4(a)(1). In Rochester Methodist, the Department of Health and Human Services ("HHS"), an agency of the United States, was a party to the proceeding below until the plaintiff's claim against it was transferred to the United States Claim Court. 728 F.2d at 1010. HHS's motion to intervene in the proceeding prior to trial was denied and HHS was not a party to the proceeding at the time judgment was entered. Nonetheless, the court declared that HHS's continued interest in the litigation and its involvement below required the 60-day provision of Rule 4(a)(1) to apply. 728 F.2d at 1012. The court reasoned that the purpose of the 60-day period was to provide the government additional time to consider amongst its several departments whether to pursue an appeal and that this purpose must be interpreted broadly to apply "when the government has a substantial interest in the case." 728 F.2d at 1011. The court concluded that the "participation and interest" of HHS in the case made it a party for purposes of Rule 4(a).

The same analysis makes the RTC a Rule 4(a) party in this matter. The RTC was clearly a party below, and at its direction considerable expenses were incurred in removing this matter to federal court and litigating the issue of federal jurisdiction. Since the removal, the RTC has supervised this litigation closely and participated in all major decisions involved in the

litigation. Respondent's Appendix at A5, Schaefer Affidavit, ¶ 6. The only remaining institutional respondent in this lawsuit, Home Owners, is an asset of the RTC; the RTC clearly has the requisite interest in the outcome of this appeal. Moreover, the government approval process that is the driving force behind the extended appeal time in Rule 4(a)(1), applies directly to this case. Respondent's Appendix at A5, Schaefer Affidavit, ¶ 6.

The May 2, 1991 amended Notice of Appeal expressly naming both Home Owners and Donley as appellants was timely and renders moot any possible defect in the original Notice of Appeal.

VII. CONCLUSION

None of the considerations governing review of Certiorari enumerated in paragraph 1(a) of Rule 10 are present in this case. The Petition is wholly without merit and should be denied.

Respectfully submitted,

Charles A. Mays
Counsel of Record
Lawrence P. Schaefer
Leonard, Street and Deinard
150 South Fifth Street
Minneapolis, MN 55402
(612) 335-1500

Counsel for Respondent M. Gene Donley

No. 92-244

In The

Supreme Court of the United States

October Term, 1992

PETER R. PIEKARSKI,

Petitioner,

vs.

HOME OWNERS SAVINGS BANK, F.S.B., AND M. GENE DONLEY,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

RESPONDENT M. GENE DONLEY'S APPENDIX

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Letter Transmitting Barry Decision A1

5/9/91 Schaefer Affidavit A2-A16

LAW OFFICES
LEONARD, STREET AND DEINARD
PROFESSIONAL ASSOCIATION

SUITE 2300
150 SOUTH FIFTH STREET
MINNEAPOLIS, MINNESOTA 55402
TELEPHONE (612) 335-1500
FACSIMILE (612) 335-1657

[Attorneys' names deleted in printing]

January 29, 1992

WRITER'S DIRECT DIAL NUMBER
(612) 335-1664

Clerk of Court
Eighth Circuit Court of Appeals
525 Federal Building
316 North Robert Street
St. Paul, MN 55101

Re: Recent United States Supreme Court Decision Affecting Notice of Appeal Issue in *Piekarski v. Home Owners Savings Bank, et al.* Court File No. 91-2132MNMI

Dear Sir/Madam:

Enclosed for circulation to Judge Friedman's, Judge John Gibson's and Judge Magill's chambers are three copies of a recent United States Supreme Court decision. Since the above-referenced case was briefed and argued, the Supreme Court has issued a decision in *William Lewis Smith v. Wayne S. Barry*, No. 90-7477, 60 U.S.L.W. 4065, ___ U.S. ___ (1/14/92), which is relevant to the notice of appeal issue affecting appellant M. Gene Donley. In *Barry* the Court held that a document which provides "notice to other parties and the court" regarding the appeal and is

filed within the time permitted to appeal under Rule 4 of the Federal Rules of Appellate Procedure can serve as the "functional equivalent" of a notice of appeal and satisfy the specificity requirement of Rule 3(c). The Appellant's Information Form A filed and served by appellant Donley with the initial Notice of Appeal in this matter contained the information required under Rule 3(c) and thus serves as the functional equivalent of the Notice of Appeal and cures any defect allegedly caused by the "et al." designation in the caption.

Very truly yours,

LEONARD, STREET AND DEINARD

By /s/ Lawrence P. Schaefer
Lawrence P. Schaefer

Enc.
cc: William Luther, Esq. (w/enc.)
M. Gene Donley (w/o enc.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Peter R. Piekarski, Appellee, -vs- Home Owners Savings Bank, F.S.B., and M. Gene Donley Appellants.	Civil Action No. 4-90-661 AFFIDAVIT OF LAWRENCE P. SCHAEFER

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

COMES NOW AFFIANT LAWRENCE P. SCHAEFER, being first duly sworn upon oath, deposes and states as follows:

1. I am an associate in the law firm of Leonard, Street and Deinard, Suite 2300, 150 South Fifth Street, Minneapolis, Minnesota 55402, counsel for appellants in the above-captioned matter.

2. On Tuesday, April 16, 1991, appellants' counsel was advised by the Clerk's Office for the Eighth Circuit Court that, pursuant to the authority of *United States v. Schneider*, 926 F.2d 777 (8th Cir. 1991), there might be a jurisdictional defect in the original Notice of Appeal filed in this case which had been captioned "Home Owners

Savings Bank, F.S.B., et al." as Defendants. The Appellant Information Form A filed therewith, however, clearly indicated that the appellants in this matter are Home Owners Savings Bank, F.S.B., *and* M. Gene Donley. This form was served upon appellee on April 5, 1991. A copy of the affidavit of service is attached hereto as Exhibit A.

3. To ensure that no confusion would arise regarding appellate jurisdiction over defendant Donley, on Wednesday, April 17, 1991, I prepared an Amended Notice of Appeal, to be filed that day or on Thursday, April 18, 1991, the last day that a timely Notice of Appeal could be filed pursuant to the thirty-day requirement of Appellate Rule 4(a)(1).

4. Attached as Exhibits B, C and D are copies of the Amended Notice of Appeal, the transmission letter enclosing same and the internal Leonard, Street and Deinard messenger request form directing that these documents be filed on Thursday, April 18, 1991.

5. I was in a hearing all day Thursday, April 18, 1991, which concluded at noon on Friday, April 19, 1991. A facsimile transmission from defendant/appellant M. Gene Donley that was unrelated to the above described documents arrived that morning, and during a break from the hearing I briefly discussed this document with my secretary. From this discussion my secretary formed the mistaken impression that the previously executed Amended Notice of Appeal was not to be filed that day, despite earlier instructions. I was not informed by my secretary until Friday, April 19, 1991 that the Amended Notice of Appeal was not filed pursuant to my earlier instructions.

6. Since the Resolution Trust Corporation placed Home Owners Federal Savings and Loan Association ("Home Owners-Boston") under conservatorship in April, 1990 and receivership in September, 1990, I have been required to gain approval for all decisions regarding this matter from the Resolution Trust Corporation attorney who is assigned to the Home Owners-Boston Receivership.

7. On April 5, 1991 defendant/appellant M. Gene Donley filed with the district court a supersedeas bond securing this judgment through appeal. A copy of said bond and accompanying transmission papers demonstrating that it was served upon appellee within the time period permitted for appeal are attached hereto as Exhibit E.

FURTHER AFFIANT SAYETH NOT.

/s/ Lawrence P. Schaefer
Lawrence P. Schaefer

Subscribed and sworn to before
me this 9th day of May, 1991.

/s/ Clarice M. Davis
Notary Public

(Seal) CLARICE M. DAVIS
NOTARY PUBLIC-MINNESOTA
ANOKA COUNTY
My Commission Expires Oct. 12, 1996

EXHIBIT A

AFFIDAVIT OF SERVICE BY MAIL

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

JULIE M. BALOT, of the City of Minneapolis, County of Hennepin, State of Minnesota, being first duly sworn upon oath, states that on the 5th day of April, 1991, on behalf of appellants she served APPELLANT'S FORM A upon appellee Peter R. Piekarski, through his counsel, by causing to be mailed true and correct copies thereof, enclosed in an envelope, postage prepaid, and by depositing same in the post office at Minneapolis, Minnesota, directed to the last known address of the persons listed below:

William P. Luther, Esq.
Luther, Ballenthin & Carruthers
4624 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402.

/s/ Julie M. Balot
Julie M. Balot

Subscribed and sworn to before me
this 5th day of April, 1991.

/s/ Clarice M. Davis
Notary Public

(Seal) CLARICE M. DAVIS
NOTARY PUBLIC-MINNESOTA
ANOKA COUNTY
My Commission Expires Oct. 12, 1996

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
FOURTH DIVISION

Peter R. Piekarski, Plaintiff, -vs- Home Owners Savings Bank and M. Gene Donley, Defendants.	Civil Action No. 4-90-661 AMENDED NOTICE OF APPEAL

Notice is hereby given that above named defendants hereby appeal to the United States Court of Appeals for the Eighth Circuit from the final judgment entered in this action on the 19th day of March, 1991.

Dated: April 17, 1991.

Respectfully submitted,

/s/ Lawrence P. Schaefer
Charles A. Mays (#69218)
Lawrence P. Schaefer (#195583)
LEONARD, STREET AND DEINARD
Suite 2300
150 South Fifth Street
Minneapolis, Minnesota 55402
Telephone: (612) 335-1500

ATTORNEYS FOR DEFENDANTS

EXHIBIT C

LAW OFFICES
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PROFESSIONAL ASSOCIATION

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150 SOUTH FIFTH STREET
MINNEAPOLIS, MINNESOTA 55402
TELEPHONE (612) 335-1500
FACSIMILE (612) 335-1657

[Attorneys' names deleted in printing]

April 18, 1991

WRITER'S DIRECT DIAL NUMBER
335-1664

BY MESSENGER

Clerk of the U.S. District Court
United States District Court
District of Minnesota
110 South Fourth Street
514 U.S. Courthouse
Minneapolis, Minnesota 55401

Re: ***Peter R. Piekarski v. Home Owners Savings Bank, F.S.B., et al.*** **Civil Action No. 4-90-661**

Dear Clerk:

Enclosed herewith for filing is the original and two copies of an Amended Notice of Appeal.

Very truly yours,

LEONARD, STREET AND
DEINARD

By /s/ Lawrence P. Schaefer
Lawrence P. Schaefer

LPS/jmb
Enclosures

EXHIBIT D

ERRAND REQUEST

Requested by: Larry Schaefer Ext. 164

Date: April 18, 1991 **Time:** 9:00 a.m.

Delivery: X **Pick-up:** **DEADLINE (time):**

Service: **Filing:** X

Approved for Outside Delivery? **Yes:** X **No:**

Immediate Notification of Delivery? **Yes:** **No:**

Name: Clerk of the United States District Court

Company Name: United States Courthouse

Address: 110 South Fourth Street
514 U.S. Courthouse
Minneapolis, Minnesota

Telephone:

Special Instructions: Please deliver envelope to clerk's office for filing. Thank you.

Client Name: Home Owners Savings Bank

Client Number: 8412-12166

Completed by: **Time:**

Comments:

EXHIBIT E

720 34 66

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
FOURTH DIVISION

Peter R. Piekarski, Plaintiff, -vs- Home Owners Savings Bank, F.S.B., et al., Defendants.	Civil Action No. 4-90-661 **SUPERSEDEAS BOND**

STATE OF MINNESOTA)
) ss.
COUNTY OF OTTER TAIL)

KNOW ALL BY THESE PRESENTS, that we M. Gene Donley, principal, and Tri-State Insurance Company of Minnesota, Surety, are held and firmly bound unto Peter R. Piekarski in the above-entitled action in the sum of twenty-five thousand dollars and no/100 ($25,000.00), to be paid to plaintiff Peter R. Piekarski or his assigns, for which payment will and truly to be made, we bind ourselves, our heirs executors and administrators, firmly by these presents.

This obligation is conditional upon the punitive damage judgment against defendant M. Gene Donley in the

above-captioned action being stayed pending resolution of appeal.

Defendant M. Gene Donley shall pay all costs and disbursements that may be adjudged against said defendant and abide the Order of the Court in the event of any final, unappealable judgment. Then this obligation shall be void, otherwise to remain in full force and effect.

Signed, Sealed and Delivered)
in Presence of)
/s/ Illegible)
/s/ Renee M. Rocholl)

PRINCIPAL (Defendant)

/s/ M. Gene Donley
M. Gene Donley

TRI-STATE INSURANCE COMPANY
OF MINNESOTA

By /s/ Patricia J. Jacobson (Seal)
Patricia J. Jacobson
Attorney in Fact

No. 90-203

POWER OF ATTORNEY
TRI-STATE INSURANCE COMPANY OF MINNESOTA
Luverne, Minnesota

NOTICE: The warning found elsewhere in this Power of Attorney affects the validity thereof. Please review carefully.

KNOWN ALL MEN BY THESE PRESENTS, that the TRI-STATE INSURANCE COMPANY OF MINNESOTA, a corporation, does hereby make constitute, and appoint

R.E. Pribbernow, Gary D. Mickelson, Patricia J. Jacobson, Karen Richards, and J.R. Strickland of Fergus Falls, MN 56537

its true and lawful Attorney-in-Fact, to make, execute, seal and deliver for and on its behalf, as surety, and as its act and deed any and all bonds, recognizances, stipulations or undertakings excluding, however, any bonds or undertakings guaranteeing payment of loans or the interest thereon, provided however, no single obligation will exceed

Two Hundred Fifty Thousand and No/100 ($250,000.00) Dollars

This Power of Attorney is not valid or in effect unless it is attached to the bond on which the execution is authorized by the said Power of Attorney. The acknowledgement and execution of any such document by the said Attorney-in-Fact, shall be as binding upon this company as if such bond has been executed and acknowledged by the regularly elected officers of this company.

The Tri-State Insurance Company of Minnesota further certifies that this Power of Attorney is granted and is executed and sealed under and by authority of the following resolution adopted by the Board of Directors of the Tri-State Insurance Company of Minnesota at a meeting duly called and held on the 29th day of April, 1974, to wit:

"RESOLVED, that the President, Vice President, Secretary, Treasurer, Assistant Secretary or Assistant Treasurer may appoint Attorneys-in-Fact or agents or Resident Vice Presidents or Resident Assistant Secretary who shall have authority to issue bonds, policies, or undertakings in the name of the Company, subject to such rules, restrictions and regulations as such officers may prescribe."

This instrument is signed and sealed by facsimile as authorized by the following Resolution adopted by the directors of the Company on November 15, 1983:

"RESOLVED, that the signature of any officer of the Company authorized to appoint Attorneys in Fact, as provided by corporate Resolution dated April 29, 1974, certifying to the correctness of any copy of a Power of Attorney and the seal of the Company, may be affixed by facsimile to any Power of Attorney or copy thereof issued on behalf of the Company. Such signatures and seal are hereby adopted by the Company as original signatures and seal, to be valid and binding upon the Company with the same force and effect as though manually affixed".

IN WITNESSES WHEREOF, the said Tri-State Insurance Company of Minnesota, a Minnesota corporation, has caused this Instrument to be executed by its President

with its corporate seal affixed this 15th day of November, 1990.

TRI-STATE INSURANCE
COMPANY OF MINNESOTA

(Stamp)

Curtis W. Bloemendaal
(signed)
By: Curtis W. Bloemendaal,
President

WARNING: THIS POWER INVALID IF NOT PRINTED ON BLUE BACKGROUND WITH RED AND BLUE BORDER.

STATE OF MINNESOTA)
COUNTY OF ROCK) SS

On this day, before the undersigned, a Notary Public in and for said County and State, personally came the above named officer of the TRI-STATE INSURANCE COMPANY OF MINNESOTA, to me personally known to be the individual and officer who executed the preceding instrument, and he acknowledged the execution of said instrument to be the voluntary act and deed of the TRI-STATE INSURANCE COMPANY OF MINNESOTA and his voluntary act and deed as an officer of said corporation, and that the seal of said corporation was affixed to said instrument by the authority and direction of the said corporation.

Witness my hand and my Notarial Seal at Luverne, Rock County, Minnesota, the day and year last written above.

(Seal) (Stamp) JUDY MILLER
NOTARY PUBLIC-MINNESOTA
ROCK COUNTY
Commission Expires Dec. 27, 1994

Judy Miller (signed)
Notary Public

CERTIFICATE

I, the undersigned, Assistant Secretary of TRI-STATE INSURANCE COMPANY OF MINNESOTA do hereby certify that the foregoing power of attorney and the above Resolution of its Board of Directors are true and correct copies and are in full force and effect on this date.

In witness whereof, I have herunto [sic] subscribed my name as Assistant Secretary, and affixed the corporate seal of the corporation this 6th day of March 1991

Form #PA-5 (Seal)

/s/ Illegible
Assistant Secretary

AFFIDAVIT OF SERVICE BY MAIL

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

JULIE M. BALOT, of the City of Minneapolis, County of Hennepin, State of Minnesota, being first duly sworn

upon oath, states that on the 26th day of March, 1991, on behalf of defendants, she served defendant M. Gene Donley's **SUPERSEDEAS BOND** upon plaintiff Peter R. Piekarski, through his counsel, by causing to be mailed true and correct copies thereof, enclosed in an envelope, postage prepaid, and by depositing same in the post office at Minneapolis, Minnesota, directed to the last known address of the persons listed below:

William P. Luther, Esq.
Kristine Legler Kaplan, Esq.
Luther, Ballenthin & Carruthers
4624 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402.

/s/ Julie M. Balot
Julie M. Balot

Subscribed and sworn to before me
this 26th day of March, 1991.

/s/ Clarice M. Davis
Notary Public

(Seal) CLARICE M. DAVIS
NOTARY PUBLIC-MINNESOTA
ANOKA COUNTY
My Commission Expires Oct. 12, 1996